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A LETTER

FROM

EFFINGHAM H. NICHOLS, ESQ.

TO THE

Secretary of the Interior.

WASHINGTON, D. C., April 27, 1871.

Hon. COLUMBUS DELANO,

Secretary of the Interior:

SIR—In accordance with your request, I submit herewith the following additional reflections upon the question whether “the circumstances” or that condition of things has arisen in the case of the Central Branch Union Pacific Railroad Company which was contemplated and provided for by the 16th section of the Pacific railroad act of 1864.

Still keeping in view that the object of the Government was to secure the construction of “a railroad,” and the *general* provisions of the statute which were so well designed and intended for the regulation of this road as *a unit*, we shall find that all the provisions of this 16th section of the act of 1864 relate to what was *then* the *established plan*. Of this there can be no doubt. It refers to roads *then* “authorized “as aforesaid;” to roads *then* “forming, or intended or necessary to form, a portion of a continuous line from each of “the several points on the Missouri river;” to roads “the “general direction and route” of which had *then* been established; to roads *then* “hereinbefore authorized to be built;” to roads *then* “hereinbefore authorized to be constructed.” The statute had defined those roads, and their *termini* were fixed. By *a road* is meant not a company, but a material structure, composed of road-bed and superstructure. A com-

pany may be authorized to build *a road*; but the company is *one* thing, the road *another*.

One of the roads referred to in this section was a road to extend "from the mouth of the Kansas river, on the "south side thereof, so as to connect with the Pacific rail- "road of Missouri at the aforesaid point on the 100th meri- "dian of longitude west from Greenwich." This road is called in the law "*the road through Kansas.*" That name is given to it repeatedly. The road of the Central Branch Company was to connect with this road, called "the road "through Kansas." The provisions of the 16th section refer, among others, *to that* road; and applying the section to the case under consideration, that road is what is meant by "*said*" road in the words "*its said road.*" Furthermore, the section does not relate to any roads which did not *then* (at that time) form a part of the plan, and which had not been theretofore "authorized."

Now, in view of what has been said, laying aside for the time being the act of 1866, the condition of things contemplated by the act of 1864 has certainly arisen in the case of the Central Branch Company. "*The road through Kansas*" not having been built as required, and our road having been completed, we stand before the department entitled to continue and extend our own road to a connection with the Union Pacific at the 100th meridian. *These rights*, then, *existing* under the act of 1864, what has occurred to *divest* these rights?

As I have already stated, no subsequent legislation can divest those rights, unless—

1st, that legislation *by its terms* repeals those rights; or,
2d, the subsequent legislation be *so inconsistent* with and *repugnant* to the former that the later, *ex necessitate*, repeals the earlier; that the two are so repugnant that *both cannot be executed*; that they are *incapable of co-existence*.

The act of 1866 contains no *direct* repeal of the rights of the Central Branch Company, for it does not by *its terms* allude to that company. And so far from the act of 1866 being

inconsistent with and repugnant to the act of 1864, not only is such not the case, but on the contrary, the act of 1866, as I have heretofore shown, is in entire harmony with the act of 1864.

But let us look at the act of 1866 from a *new* stand-point. As to what the Eastern Division Company may have done or accomplished under that act, we will not now consider. The only point we will consider is its relations to the "road through Kansas;" and I think it may be safely asserted that all that it is material for us to consider is the fact that the act of 1866 *relieved* the Eastern Division Company from its *obligation* to construct "the road through Kansas."

By the act of 1862, the Eastern Division company had been "*authorized*" to construct "the road through Kansas." The 7th section of that act provided for each company filing its "*assent*," under seal, to the provisions of the act. Upon the filing of that assent by the Eastern Division Company, the Eastern Division Company became *obligated* to construct "the road through Kansas." The effect, then, of this act of 1866 was to *release* the Eastern Division Company from its *obligation* to construct this road, which obligation arose solely from the filing of its assent.

Now, let us suppose that the Eastern Division Company had never filed its "assent." Then, so far as "the road through Kansas" was concerned, the Eastern Division Company would be precisely in the same condition in which it now stands, at least so far as the unconstructed portion of that road is concerned. If we will turn now to the 16th section, and read its provisions with reference to "the road through Kansas," and assume that the Eastern Division Company had never filed its "assent," and therefore never became *obligated* to construct that which it was "*authorized*" to construct, we shall find that this condition of things would not change in any degree the object, purpose, and intent of this section. For the language of the section is, "that in "case * * any other of the road or roads * * * "*authorized* as aforesaid," &c. It has reference to the roads

authorized to be constructed, and not solely to roads which parties had become *obligated* to construct. It makes no difference to the Central Branch Company whether the Eastern Division Company ever filed its *assent* or not, or whether it to-day is *obligated* to construct or not. The Central Branch Company invested its money upon the faith of the provision relating to roads "*authorized*" to be constructed, and not upon the *obligations* of any companies to construct those roads. Their money was invested upon the grant of the right to build the *connecting link*, (*conditionally*), as well as the right to build the *section from Atchison*, (*absolutely*.) The contract was *one* and *inseparable*; the consideration was one and inseparable. They undertook to construct a section or part of what was insured to them beyond all peradventure was to be a *part* of "one connected, continuous line" of road-bed and superstructure. And in case any section of this contemplated structure which had been authorized, and which formed, or was intended or necessary to form, a portion of a continuous line, should not be actually constructed, then the Central Branch Company, upon the completion of the part originally assigned to it, was not only "authorized," but became "*entitled*" to continue the construction of *its own* road-bed and superstructure, and for and in aid of the construction thereof, "entitled to similar and like "grants, benefits, immunities, guarantees, acts, and things "to be done and performed by the Government of the "United States, by the President of the United States, by "the Secretaries of the Treasury and Interior, and by com-
"missioners."

I may not, Mr. Secretary, have expressed myself on this last-named point with sufficient clearness, but if I have said enough to communicate the thought intended to be suggested, I most respectfully request that you will read the entire 16th section through, having in view that the Eastern Division Company is now under no *obligation* to do that which it was "*authorized*" to do; and it is quite immaterial whether that company ever entered into the *obligation*, or whether, having

entered in, it is now *relieved* from the *obligation*. And after this severe analysis of the language of this section, I think that you will agree with me in the statement that this section evinces upon the part of its author a most complete and perfect comprehension of the end in view, the object to be attained, and the contingencies to be provided for. I, for one, do not see wherein I would alter or change this section to meet the case under consideration if I had the power so to do.

I have the honor to be, your obedient servant,

EFF'M H. NICHOLS.

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